

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.A. LOCAL 342 JOINT LABOR -
MANAGEMENT COMMITTEE, et
al.,

No. C-04- 2531 SBA (WDB)
No. C-05-1758 SBA (WDB)

Plaintiffs,

v.

AIRTEKS MECHANICAL
SERVICES, INC., a California
Corporation, and JEROME
BOHLAND,

Defendants.

**REPORT AND
RECOMMENDATION RE
PLAINTIFFS' CONSOLIDATED
MOTIONS FOR DEFAULT
JUDGMENT**

_____/
and related case
_____/

Plaintiffs are U.A. Local 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (“union”), various fringe benefit trust funds established for the benefit of union members, and the trustee of those fringe benefit trust funds. *See*, Complaint, filed June 24, 2004, and First Amended Complaint (“FAC”), filed December 22, 2004, in C04-2531; Complaint, filed April 27, 2005, in C05-1758. Defendant, Airteks Mechanical Services, Inc., is bound by a collective bargaining agreement and various trust agreements to make timely contributions to plaintiff trust funds for covered work performed by Airteks employees. Declaration of Larry Blevins in Support of Motion for

1 Default Judgment, filed in C05-1758 SBA on August 8, 2005, (“Blevins Decl.”) at
2 ¶4 and Ex. A and D. Defendant Jerome Bohland is an individual and an
3 authorized representative of Airteks. Blevins Decl., at Ex. D.

4 On June 24, 2004, plaintiffs filed a complaint against Airteks seeking to
5 collect unpaid contributions due to multi-employer benefit plans and to obtain
6 monthly reports pursuant to the governing collective bargaining agreement. See,
7 Complaint, C04-2531 SBA. On December 22, 2004, plaintiffs filed a First
8 Amended Complaint in Civil Action C04-2531 SBA, containing essentially the
9 same allegations and adding Mr. Bohland as a defendant.

10 On April 27, 2005, plaintiffs filed a separate complaint commencing a new
11 action, C05-1758 SBA.¹ The 2005 complaint alleges that Airteks and Mr.
12 Bohland refuse to submit to an audit as required by the collective bargaining
13 agreement, asks the Court to compel defendants to comply with such an audit, and
14 seeks a judgment for amounts found owing at the conclusion of the audit.
15 Complaint C05-1758, at ¶9.²

16 Plaintiffs served defendants with a copy of each complaint. Summons and
17 Proofs of Service, filed in C04-2531 on July 28, 2004 and February 7, 2005;
18 Summons and Proof of Service, filed in C05-1758 on May 30, 2005. Defendants
19 have not responded to any of the complaints.

20 In response to plaintiffs’ applications for entry of default, the Clerk of the
21 Court entered default as to Airteks with respect to Civil Action C04-2531 on April
22 25, 2005, and entered default as to Airteks with respect to Civil Action C05-1758
23 on July 5, 2005.

24
25
26 ¹This action originally was assigned to Judge White. Eventually, however, the 2004 and
2005 actions were related and C05-1758 was reassigned to Judge Armstrong.

27 ²For clarity, our citations to the record will include the case number for the action in
28 which the cited document was filed.

1 As we read it, plaintiffs' application for entry of default in Civil Action
2 C04-2531 seeks entry of default only as to Airteks. Appropriately, the Clerk
3 entered default only as to Airteks. In contrast, in their application for entry of
4 default in Civil Action C05-1758 plaintiffs also requested default against Mr.
5 Bohland. However, apparently as a result of administrative oversight, the Clerk
6 has not entered default as to Mr. Bohland in the 2005 action.

7 Plaintiffs filed and served a motion for default judgment in each action.
8 See, Motion for Default Judgment and Proof of Service, filed in C04-2531 on
9 September 16, 2005; Motion for Default Judgment and Proof of Service, filed in
10 C05-1758 on August 8, 2005. Judge White referred plaintiffs' August 8th motion
11 to the undersigned. On November 15, 2005, Judge Armstrong ruled that the two
12 actions were related. She then referred plaintiffs' September 16th motion to the
13 undersigned. Order Referring Motion, filed November 28, 2005.

14 On December 1, 2005, this court ordered plaintiffs to file a consolidated
15 memorandum of points and authorities, *inter alia*, addressing all of the relief
16 sought via both actions. Order re Related Motions for Default Judgment. On
17 December 23, 2005, plaintiffs filed their Consolidated Points and Authorities in
18 Support of Motion for Default Judgment (hereafter "Consolidated Motion") and
19 additional supporting papers.

20 On January 18, 2006, this court conducted a hearing in connection with
21 plaintiffs' Consolidated Motion. No appearance was made on defendants' behalf.³

22 In their Consolidated Motion, plaintiffs seek a judgment against Airteks and
23 Mr. Bohland in the amount \$30,685.58 to recover unpaid contributions, liquidated
24 damages, interest, attorneys' fees and costs. Plaintiffs also seek an order
25

26 ³Before the District Court related these cases, the undersigned also conducted a hearing
27 on September 28, 2005, in C05-1758, in connection with plaintiff's August 8th motion for
28 default judgment. No appearance was made on defendants' behalf at the September 28th
hearing.

1 compelling defendants to produce monthly contribution reports, to submit to an
2 audit of Airteks' payroll records, and to pay all additional amounts deemed owing
3 by the auditor.

4
5 **I. Entitlement to Entry of Default Judgment**

6 Plaintiffs seek entry of judgment by default against the entity Airteks as
7 well as against Mr. Bohland, individually. Consolidated Motion at 2, n.1.

8 Plaintiffs served Airteks with their motions for default judgment. See,
9 Proof of Service, filed in C04-2531 on September 16, 2005; Proof of Service filed
10 in C05-1758 on August 8, 2005; Proofs of Service filed in both actions on
11 December 23, 2005; see also, Letter from plaintiffs' counsel, filed in C05-1758, on
12 October 4, 2005. Airteks has failed to respond, and the Clerk of the Court entered
13 default as to this defendant. Given Airtek's complete failure to appear and the
14 significant risk of prejudice to the employee beneficiaries of the fringe benefit
15 trusts when an employer fails to make the required contributions, the sufficiency
16 of plaintiff's complaints, and the apparent merit of plaintiffs' substantive claims,
17 we RECOMMEND that Judge Armstrong find that plaintiffs are entitled to
18 judgment by default against Airteks Mechanical Services, Incorporated with
19 respect to both actions. See, F.R.C.P. 55(b); *Eitel v. McCool*, 782 F.2d 1470 (9th
20 Cir. 1986).

21 The Clerk has not, however, entered default against Mr. Bohland in either
22 action. Therefore, we cannot recommend that Judge Armstrong enter judgment by
23 default against Mr. Bohland, individually. Plaintiffs represented on the record
24 that, at this juncture, they wish to proceed with their Consolidated Motion as
25 against Airteks. See, Transcript January 18, 2006, hearing; Transcript September
26 28, 2005, hearing in C05-1758. By proceeding with this Consolidated Motion as
27 against the entity only, plaintiffs have not waived any entitlements they may have
28

1 against Mr. Bohland individually. *Id.* We RECOMMEND that Judge Armstrong
 2 permit plaintiffs to reapply to the Clerk for entry of default as to Mr. Bohland if
 3 they choose, and if the Clerk enters default, to file a new consolidated motion for
 4 default judgment directed to Mr. Bohland, individually, at a later date.

5 We further RECOMMEND that Judge Armstrong expressly find and direct
 6 that it is appropriate to enter judgment against fewer than all defendants on the
 7 ground that there is “no just reason for delay” where, as here, employee
 8 beneficiaries of the fringe benefit trust funds may suffer irreparable damage if
 9 plaintiffs are delayed or unable to collect delinquent contributions owed to the
 10 funds and where Airteks and Mr. Bohland are likely to be one and the same.
 11 F.R.C.P. 54(b).

12 13 **II. Specific Items of Relief Sought by Plaintiffs**

14 Section 1132(g)(2) of ERISA provides that in an action for delinquent
 15 contributions

16 in which a judgment in favor of the plan is awarded the court *shall*
 17 award the plan --

- 18 (A) the unpaid contributions,
- 19 (B) interest on the unpaid contributions,
- 20 (C) an amount equal to . . . (ii) liquidated damages provided for under the
 plan in an amount not in excess of 20 percent . . . of the amount
 determined by the court under subparagraph (A),
- 21 (D) reasonable attorneys’ fees and costs of the action . . . , and
- 22 (E) such other legal or equitable relief as the court deems appropriate.

23 For purposes of this paragraph, interest on unpaid contributions shall
 24 be determined by using the rate provided under the plan . . .

25 29 U.S.C. §1132(g)(2) emphasis added.

26 **A. Unpaid contributions**

27 Plaintiffs seek unpaid contributions known to be delinquent at this time in
 28 the amount \$14,823.24, owing pursuant to the governing collective bargaining and
 trust agreements. Consolidated Motion at 5; Declaration of Kim Biagi in Support

1 of Motion for Default Judgment, filed in C04-2531 on September 16, 2005,
2 (“Biagi Decl.”), at ¶3 and Ex. A.

3 Defendant Airteks is the signatory to a Master Labor Agreement between
4 the union and Airteks’ “bargaining agent,” Northern California Mechanical
5 Contractors Association. Blevins Decl., at Ex. A and D. The collective
6 bargaining agreement incorporates applicable Trust Agreements, and signatories
7 agree to be bound by the terms of those agreements. Blevins Decl., at Ex. A and
8 C. The collective bargaining agreement governs employer contributions to the
9 various employee fringe benefit trust funds and obligates employers to pay
10 specified amounts into employee benefit funds on behalf of Airteks’ employees
11 who perform covered work. *Id.*

12 Airteks became a signatory to the collective bargaining agreement on
13 February 20, 2002. Belvins Decl., at Ex. D. Airteks has not invoked the
14 procedures that would release it from its obligations under that agreement.
15 Blevins Decl., at ¶4 and Ex. D; Transcript January 18, 2006, hearing.
16 Accordingly, Airteks is obligated to pay contributions for covered work conducted
17 by its employees for the period February 20, 2002, through the present. *Id.*, at ¶4
18 and Ex. A, B, C, and D.

19 Plaintiffs seek a judgment for unpaid contributions known to be delinquent
20 at this time, in the amount \$14,823.24.⁴ Consolidated Motion at 5; Biagi Decl., at
21 ¶3. According to plaintiffs, Airteks has not submitted monthly reports for the
22 months of June, August, November, and December of 2003. Biagi Decl., at ¶3;
23 Consolidated Motion at 9. However, based on earnings statements provided by an
24 Airteks’ employee, Gabriel Minor, plaintiffs have determined that defendant owes
25 at least \$14,823.24 for unpaid contributions for covered work done by Mr. Minor

26
27 ⁴Plaintiffs seek two categories of unpaid contributions in their Consolidated Motion: (1)
28 contributions that they have determined are delinquent at this time as a result of information
obtained from an Airteks’ employee and (2) contributions, if any, found to be delinquent as a
result of the requested audit. In this section we address only the former. We address the latter
in section II.C.1, *infra*.

1 in 2003. Biagi Decl., ¶3 and Ex. A. Because such damages are supported by the
2 evidence, we RECOMMEND that the District Court enter judgment against
3 Airteks in the amount \$14,823.24 for unpaid contributions known to be delinquent
4 at this time.

5 Plaintiffs request that the Court enter the monetary judgment in the name of
6 “UA Local 342 Joint Labor-Management Committee” (“JLM”) and assert that
7 JLM will distribute the amounts received pursuant to a “Joint Services
8 Agreement.” Consolidated Motion at n.4; Declaration of John L. Anderson in
9 Support of Consolidated Motion for Default Judgment, filed December 23, 2005
10 (“Anderson Decl.”). We have reviewed the evidence submitted by plaintiffs and
11 find that the Joint Services Agreement compels JLM to distribute monies received
12 as a result of a monetary judgment among the Trusts Funds in a particular order.
13 We RECOMMEND that the District Court enter judgment in the name of JLM and
14 order JLM to distribute the judgment pursuant to the terms of the Joint Services
15 Agreement.

16
17 **B. Interest and Liquidated Damages**

18 Plaintiffs seek interest and liquidated damages relating to the unpaid
19 contributions known to be delinquent at this time in the total amount \$5,424.63.
20 Consolidated Motion at 5; Biagi Decl., at ¶3.

21
22 **1. Interest**

23 If the Court enters judgment in plaintiffs’ favor for unpaid contributions,
24 ERISA requires the Court to award plaintiffs “interest on the unpaid
25 contributions.” 29 U.S.C. §1132(g)(2)(B).

26 Plaintiffs seek interest on the delinquent contributions at the rate of 12%.
27 Consolidated Motion at 3; FAC in C04-2531, at ¶11; Complaint in C05-1758, at
28 ¶10. Plaintiffs have submitted evidence that supports a finding that 12% is the

1 applicable interest rate under the Trust Agreements. Blevins Decl., at ¶6 and Ex.
2 C.⁵

3 ERISA provides that “interest on unpaid contributions shall be determined
4 by using the rate provided under the plan.” 29 U.S.C. §1132(g)(2). We, therefore,
5 RECOMMEND that the District Judge grant plaintiffs’ request for judgment for
6 interest on the unpaid contributions at the rate of 12% on delinquent contributions
7 from the date due through the date paid or, if as yet unpaid, through the date of
8 judgment.

9 Plaintiffs’ current interest calculation includes interest that has accrued
10 through August 20, 2005. Biagi Decl., at ¶3; Consolidated Motion at 5. In the
11 event Judge Armstrong adopts our recommendation, we also RECOMMEND that
12 the Court permit plaintiffs to file an additional submission calculating interest
13 through the date of judgment.

14 15 **2. Liquidated Damages**

16 Plaintiffs seek liquidated damages at the contract rate of 20%. Consolidated
17 Motion at 3; FAC in C04-2531 at ¶11; Complaint in C05-1758, at ¶10; Blevins
18 Decl., at ¶5 and Ex. C.

19 ERISA compels the court to award plaintiffs “liquidated damages provided
20 for under the plan in an amount not in excess of 20 percent . . . of the amount
21 determined by the court [as unpaid contributions].” 29 U.S.C. §1132(g)(2)(C)(ii).
22 Liquidated damages are “mandatory and not discretionary” if “the following three
23 requirements [are] satisfied: (1) the employer must be delinquent at the time the
24 action is filed; (2) the district court must enter a judgment against the employer;
25 and (3) the plan must provide for such an award.” *Northwest Administrators, Inc.*,

26
27 ⁵In support of their claims for interest and liquidated damages plaintiffs also reference a
28 document called “Joint Services Agreement.” Because defendant is not a signatory to this
document the rates for interest and liquidated damages therein cannot bind defendant. The rates
sought by plaintiffs are contained, nonetheless, in the Trust Agreements to which Airteks is
bound.

1 *v. Albertson's Inc.*, 104 F.3d 253 (9th Cir. 1996) citing *Idaho Plumbers &*
2 *Pipefitters v. United Mechanical Contractors, Inc.*, 875 F.2d 212 (9th Cir. 1989).

3 With respect to the first requirement -- whether the employer was delinquent
4 at the time the action is filed -- we note that plaintiffs have filed three complaints
5 in these related actions. Because the original complaint in C04-2351 named
6 Airteks as a defendant and because the 2004 and 2005 actions are essentially
7 identical, we RECOMMEND that Judge Armstrong find that the relevant
8 complaint for these purposes is the original complaint filed in C04-2531 on June
9 24, 2004.⁶ Plaintiffs have submitted evidence that supports a finding that there
10 were contributions that were delinquent and unpaid at the time plaintiffs filed their
11 first lawsuit on June 24, 2004, and that the collective bargaining agreement
12 together with Trust Agreements provide for an award of liquidated damages on
13 such sums at the rate of 20% where, as here, plaintiffs have filed a lawsuit to
14 collect delinquent contributions. Biagi Decl., at 2; Blevins Decl., at ¶5 and Ex. A
15 and C. Therefore, plaintiffs have satisfied the first and third *Northwest*
16 requirements.

17 If Judge Armstrong adopts our recommendation to enter judgment against
18 Airteks for unpaid contributions in the amount \$14,823.24, plaintiffs will have
19 satisfied the second requirement.

20 We RECOMMEND that, if Judge Armstrong enters judgment against
21 Airteks for unpaid contributions known to be delinquent at this time, she also enter
22 judgment for liquidated damages in connection with the contributions that were
23 delinquent and unpaid as of June 24, 2004, the date plaintiffs filed lawsuit C04-
24 2531.⁷

25
26 ⁶We make no recommendation at this time with respect to whether the same date would
27 apply in a motion for default judgment against Mr. Bohland, individually, where, as here, Mr.
28 Bohland was not named as a defendant until December 22, 2004.

⁷Plaintiffs are entitled to liquidated damages on these amounts even if Airteks paid those
contributions after the lawsuit was filed. *Accord, Northwest*, 104 F.3d at 258.

1 **3. Total Interest and Liquidated Damages on Unpaid**
2 **Contributions**

3 For the reasons stated above, we RECOMMEND that the District Court
4 enter judgment by default for interest on unpaid contributions known to be
5 delinquent at this time at the rate of 12% through August 20, 2005, and liquidated
6 damages relating to those unpaid contributions at the rate of 20% in the total
7 amount \$5,424.63.

8 We also RECOMMEND that Judge Armstrong permit plaintiffs to submit
9 supplemental information setting forth the amount of interest that has accrued
10 through the present (or through the date of judgment).

11
12 **C. Request for Audit, Production of Monthly Reports, and Amounts**
13 **Owing at Conclusion of Audit**

14 The collective bargaining agreement to which Airteks is a signatory governs
15 employer contributions to the various employee fringe benefit trust funds and
16 obligates employers to submit to the fringe benefit trust funds monthly reports
17 documenting the number of hours worked by covered employees together with the
18 monthly payments indicated as owing by each month's report. Blevins Decl., at
19 Ex. A at 30. The governing Trust Agreements also obligate the employer to
20 submit to an audit of its records for the purpose of determining whether the
21 employer has paid the appropriate amount of contributions to the fringe benefit
22 trusts. Blevins Decl., at ¶2 and Ex. C at 16-17.

23 Plaintiffs obtained documentation that at least one employee who was sent
24 to Airteks out of the union hall performed covered work in 2003 for which Airteks
25 did not submit reports or pay contributions. Biagi Decl., at ¶3 and Ex. A.
26 Plaintiffs do not know whether covered work was performed for Airteks in 2004
27 and 2005. Airteks has submitted no reports for these years. Airteks has refused to
28

1 submit to an audit of its records as contemplated by the collective bargaining
2 agreement. Biagi Decl., at ¶ 3; Blevins Decl., at 5.

3 Airteks has breached the collective bargaining agreement by, *inter alia*,
4 failing to submit monthly reports documenting the hours worked by covered
5 employees and refusing to submit to an audit. Biagi Decl., at ¶ 3; Blevins Decl., at
6 5. Section 1132 of ERISA authorizes the Court to award “such legal and equitable
7 relief as the court deems appropriate.” 29 U.S.C. §1132(g)(2)(E). Airteks’ failure
8 to accurately report Mr. Minor’s work in 2003 supports plaintiffs’ concern that
9 Airteks may not have accurately reported covered work in other months and that
10 Airteks may be withholding information that would demonstrate that covered
11 work was completed in 2004 and/or 2005. We think this justifies an audit that
12 runs from February 20, 2002, the date Airteks became bound by the governing
13 collective bargaining agreement, through the present.

14 We RECOMMEND that Judge Armstrong enter judgment compelling
15 defendant Airteks to submit to an audit for the purpose of determining the amount
16 of fringe benefit contributions owed for the period from February 20, 2002,
17 through the present, and to provide relevant records requested by the auditor,
18 including, without limitation, Airteks’ monthly reports for June, August, November
19 and December 2003 and for 2004 and 2005.

20 Plaintiffs also ask the Court to compel Airteks to pay contributions, interest
21 and liquidated damages found owing as a result of the audit.

22
23 **1. Unpaid Contributions Found Owing at Conclusion of Audit**

24 Plaintiffs’ counsel represented that it is plaintiffs’ practice to have the
25 auditor send her full report in draft form to the employer. The employer will then
26 have thirty days to respond or to seek an extension of time in which to submit
27 additional documentation for the auditor’s consideration. When the auditor’s
28 process is complete, she will send a final report to the employer and to the Board of

1 Trustees, which is composed of union and employer representatives. The Board
2 will provide Airteks with a second opportunity to present objections to the
3 auditor's conclusions. The Board then votes on the report. Plaintiffs' counsel
4 represented on the record that he would ensure that Airteks receives notice of the
5 Board's proceedings. See, Transcript of January 18, 2006, hearing; Transcript of
6 September 28, 2005, hearing.

7 We RECOMMEND that Judge Armstrong enter judgment for the amount of
8 unpaid contributions found owing as a result of the audit on the condition that
9 Airteks receives notice of the auditor's findings and an opportunity to respond at a
10 proceeding before the Board.

11 12 **2. Interest Found Owing at Conclusion of the Audit**

13 For the reasons stated in section II.B.1 above, we RECOMMEND that the
14 District Court find that plaintiffs are entitled to interest at the rate of 12% on
15 unpaid contributions found owing at the conclusion of the audit from the date due
16 until the date paid or until Court enters judgment on those amounts.

17 18 19 **3. Liquidated Damages on Delinquent Contributions Found** 20 **Owing from Audit**

21 Plaintiffs are entitled to mandatory liquidated damages under ERISA at the
22 rate of 20% on contributions that were unpaid on June 24, 2004, (the date plaintiffs
23 filed the first action). Absent the audit, plaintiffs cannot identify with certainty
24 which, if any, of the remaining contributions were delinquent and unpaid as of June
25 24, 2004.

26 For the purposes of determining whether plaintiffs are entitled to liquidated
27 damages on contributions found delinquent as a result of the audit, and if so, the
28 amount of any such liquidated damages, we group potentially delinquent

1 contributions into three categories: (1) contributions that had become delinquent
 2 but that defendant paid before plaintiffs filed the first complaint, (2) contributions
 3 that were both late and unpaid at the time that complaint was filed, and (3)
 4 contributions that came due after that complaint was filed, became delinquent, and
 5 either were paid late or remain unpaid.

6
 7 **a. Liquidated Damages on Contributions That Were**
 8 **Delinquent and Unpaid at the Time Plaintiffs Filed the**
 9 **First Lawsuit**

10 For the reasons stated in section II.B.2, we RECOMMEND that, if Judge
 11 Armstrong enters judgment against Airteks for unpaid contributions found owing at
 12 the conclusion of the audit, she also enter judgment for statutory liquidated
 13 damages at the rate of 20% in connection with those contributions that were
 14 delinquent and unpaid at the time plaintiffs first filed the lawsuit C04-2531 -- on
 15 June 24, 2004.

16
 17 **b. Liquidated Damages on Contributions That Became**
 18 **Delinquent after Plaintiffs Filed the First Lawsuit**

19 The Ninth Circuit has not yet ruled with respect to whether plaintiffs can
 20 recover statutory liquidated damages in connection with contributions that matured
 21 after suit was filed where defendant was delinquent with respect to other
 22 contributions at the time suit was filed. There has been a split among the lower
 23 courts of this District on this issue.

24 In *Board of Trustees v. Udovch*, 771 F.Supp. 1044 (N.D.Cal 1991), the
 25 undersigned held that the Ninth Circuit's opinion in *Parkhurst v. Armstrong Steel*
 26 *Erectors, Inc.*, 901 F.2d 796 (9th Cir. 1990), required the court to deny recovery of
 27 statutory liquidated damages on contributions that had not matured at the time suit
 28 was filed. We have since been persuaded by the reasoning set forth in *Board of*

1 *Trustees v. Bridon*, 1995 WL 573701 (N.D. Cal 1995), that it is impractical and
 2 counterproductive to apply rigidly *Parkhurst*'s broad statements to the
 3 circumstances before us, circumstances not considered by the Ninth Circuit in
 4 *Parkhurst*. Therefore, we RECOMMEND that Judge Armstrong follow cases such
 5 as *Bridon* and *Roofers Local Union No. 81 v. Wedge Roofing, Inc.*, 811 F.Supp.
 6 1398 (N.D.Cal. 1992), which adopt the more practical approach and award
 7 statutory liquidated damages at the rate of 20% on contributions that came due and
 8 became delinquent after plaintiffs filed their original complaint on June 24, 2004.

9
 10 **c. Liquidated Damages on Contributions That Became**
 11 **Delinquent but Were Paid Before Plaintiffs Filed the**
 12 **First Lawsuit**

13 If Airteks was delinquent with respect to contributions but paid those
 14 contributions before plaintiffs filed the first complaint on June 24, 2004, plaintiffs
 15 are not entitled to statutory liquidated damages on those contributions. Plaintiffs
 16 might, however, be entitled to liquidated damages as a matter of contract. *Idaho*
 17 *Plumbers*, 875 F.2d at 217 (§1132(g)(2) does not preempt the federal common law
 18 of liquidated damages when that section does not apply); *Board of Trustees v.*
 19 *Udovch*, 771 F.Supp. 1044 (N.D. Cal 1991).

20 A contractual "liquidated damages provision is enforceable in this setting,
 21 and not void as a penalty, only if (1) 'the harm caused by a breach [is] very difficult
 22 or impossible to estimate' and (2) the fixed amount is 'a reasonable forecast of just
 23 compensation for the harm caused.'" *Udovch*, 771 F.Supp. at 1048 citing *Idaho*
 24 *Plumbers*, 875 F.2d at 217.

25 We RECOMMEND that Judge Armstrong find that plaintiffs have satisfied
 26 the first prong of the test. As stated in *Udovch* "[w]hen an employer is delinquent
 27 in paying contributions into a fringe benefit trust fund, the fund suffers some kinds
 28 of harms that are very difficult to gauge." 771 F. Supp. at 1049.

1 With respect to the second prong of the test, whether the fixed amount
 2 represents a reasonable forecast for the harm caused, we focus on the “parties’
 3 intentions.” *Udovch*, 771 F. Supp. at 1048. The negotiating parties “must make a
 4 good faith attempt to set an amount equivalent to the damages they anticipate.”
 5 *Idaho Plumbers*, 875 F.2d at 217. For the reasons explained in *Udovch* we focus
 6 “on the character of the process that led, at the time the contract language was
 7 drafted, to the fixing of the liquidated damages figures or formulas.” 771 F.Supp.
 8 at 1048. We look for evidence that “the drafters made a good faith effort to
 9 determine that there would be a rational relationship between the damages that
 10 would be paid under the clause and the harms that would be suffered *in most of the*
 11 *situations that were reasonably foreseeable.*” 771 F. Supp. at 1049 (emphasis in
 12 original). More specifically, we look for evidence:

13 (1) that the drafters gave some thought to the kinds of harms that the
 14 liquidated damages provision would embrace, (2) that other more
 15 direct provisions were not made for compensation for at least the bulk
 16 of the harms intended to be so embraced, and (3) that it was not
 17 obvious, at the time of drafting, that the figure or formula selected
 would result, in a substantial percentage of instances in which it might
 be triggered, in amounts of money flowing from defendants to
 plaintiffs that clearly would be larger than necessary to compensate for
 the kinds of harms the plaintiffs were likely to in fact suffer.

18 *Udovch*, 771 F.Supp. at 1048. Plaintiffs may not receive contractual liquidated
 19 damages if such damages would constitute nothing more than a “penalty.”

20 Under the Trust Agreements, liquidated damages initially are charged at the
 21 rate of 10% of any unpaid amount or \$100.00, whichever is greater, plus interest.
 22 Blevins Decl., at Ex. C (Trust Agreement) at 14. The representative Trust
 23 Agreement submitted by plaintiffs identifies some kinds of harms that the
 24 liquidated damages would embrace, such as loss of return on investment, inability
 25 to pay benefits, and collection expenses, indicating that the drafters gave some
 26 thought to the kinds of harms the liquidated damages provisions would embrace.
 27 Blevins Decl., at Ex. C (Trust Agreement) at 14. Also, this provision of the Trust
 28 Agreement seems to cap liquidated damages at \$500.00 (presumably per

1 occurrence – *i.e.*, per month that contributions are delinquent). Blevins Decl., at
2 Ex. C (Trust Agreement at 14-15) (“In no event, however, shall the liquidated
3 damages exceed \$500.00.”). As we read the Agreement, this cap applies only until
4 such time as plaintiffs find it necessary to file a legal action to collect the
5 delinquency. This cap represents a reasonable attempt to limit liquidated damages
6 during the period before the expense of trying to collect increases substantially
7 with the initiation of litigation.

8 As a separate matter, we note that, as a general rule, full compensation
9 requires payment of interest on the sums ‘lost.’ It follows that the provision for
10 interest on liquidated damages constitutes a reasonable attempt to compensate
11 plaintiffs, not a penalty.

12 We RECOMMEND that Judge Armstrong find that the liquidated damages
13 provision at the rate of 10% per month (but not less than \$100.00), with a \$500.00
14 per occurrence cap, plus interest, constitutes a “reasonable forecast of just
15 compensation for the harm caused.” *Idaho Plumbers*, 875 F.2d at 217.

16 If plaintiffs are required (by defendant's unresponsiveness) to file a legal
17 action to collect the delinquency the contract provides that liquidated damages are
18 to increase to 20%. Blevins Decl., at Ex. C. By the terms of the Trust Agreement,
19 this 20% liquidated damages provision applies only to “[c]ontributions still unpaid
20 on the date the legal action is filed.” Blevins Decl., at Ex. C (Trust Agreement) at
21 15 (emphasis added). Liquidated damages on such contributions would be
22 mandatory under ERISA. See, *supra*. In light of this limiting language, plaintiffs
23 do not appear to seek 20% contractual liquidated damages on contributions
24 delinquent but paid before the legal action was filed. If, however, plaintiffs were to
25
26
27
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1 request liquidated damages at the rate of 20% on such contributions we would
2 RECOMMEND that Judge Armstrong deny the request.⁸

3 For these reasons, if the audit reveals that Airteks was delinquent with
4 respect to fringe benefit contributions but that Airteks paid those contributions
5 before June 24, 2004, we RECOMMEND that Judge Armstrong award liquidated
6 damages on these delinquent contributions pursuant to the contract at the rate of
7 10% of the delinquent contributions (but not less than \$100.00) with a monthly
8 occurrence cap of \$500.00, plus interest.

9
10 **d. Recommendation**

11 We RECOMMEND that the District Court order Airteks to pay liquidated
12 damages on contributions found delinquent at the conclusion of the audit consistent
13 with paragraphs (a)-(c) above.

14
15 **D. Attorneys' Fees and Costs**

16 Section 1132(g) of ERISA requires the Court to award plaintiffs "reasonable
17 attorney's fees and costs of the action" when plaintiffs obtain a judgment in their
18 favor or otherwise obtain the relief sought. 29 U.S.C. §1132(g)(2)(D); *Northwest*
19 *Administrators*, 104 F.3d at 258.

20
21 _____
22 ⁸The submitted Agreement does not identify any additional damages that would be
23 difficult to assess and that would occasion the need for the additional 10%. Moreover, the
24 collective bargaining agreement and the Trust Agreement provide that plaintiffs are entitled to
25 reimbursement of attorneys' fees and other costs. Blevins Decl., at Ex. A (Master Agreement)
26 at 31 (if plaintiffs must consult counsel they are entitled to "reasonable attorneys' fees, auditors'
27 and accountants' fees, court costs and all other reasonable expenses incurred in connection with
28 such suit or claim") and Ex. C (Trust Agreement) at 14. The provision for attorneys' fees and
costs appears to capture the obvious additional costs incurred if plaintiffs must file a legal action.
At this juncture, there is no indication in the Agreement or supporting declarations about what
other (non-obvious) kinds of damages might be occasioned by the need to file a legal action. Nor
does the Agreement suggest why any such additional damages would be difficult to assess.
Because other, more direct provisions were made for compensation for the bulk of harms
intended to be embraced by an additional 10%, in our view, plaintiffs have not yet justified an
additional 10% which, based on the evidence before us, would be nothing more than a "penalty."

1 Plaintiffs seek reimbursement of attorneys' fees and costs in the amount
 2 \$10,437.71. Consolidated Motion at 6; Declaration of Scott M. DeNardo in
 3 Support of Consolidated Motion for Default Judgment, filed December 23, 2005
 4 ("Consolidated De Nardo Decl."), at 3.⁹

5
 6 **1. Tasks Conducted and Number of Hours Spent on Those**
 7 **Tasks**

8 Plaintiffs seek fees in connection with tasks such as drafting and filing the
 9 complaints, requesting default, and the instant Consolidated Motion. See, Exhibits
 10 to C04-2531 and C05-1758 DeNardo Decl. and to Consolidated DeNardo Decl.,
 11 and to October 4, 2005, letter on file in C05-1758.

12 In its Order re Related Motions for Default Judgment, filed December 1,
 13 2005, this court notified plaintiffs that it was disinclined to recommend that the
 14 District Court award reimbursement of fees that could have been avoided by
 15 amending the 2004 complaint for damages rather than filing a separate action for
 16 an audit in 2005. In response, plaintiffs' counsel eliminated from plaintiffs' fee
 17 request hours that, in his judgment, were duplicative or otherwise excessive or
 18 unnecessary. Consolidated De Nardo Decl., at ¶¶4-5. Accordingly, the instant fee
 19 request does not seek recovery for all work conducted by counsel in connection
 20 with both actions.

21 We have reviewed counsel's revised billing statements and RECOMMEND
 22 that the District court find that the kinds of tasks conducted by counsel were
 23 reasonably undertaken. We also RECOMMEND that the District Court find that
 24 counsel expended a reasonable number of hours completing those tasks for which
 25 compensation is warranted.

26
 27
 28 ⁹See also, C04-2531 Declaration of Scott M. DeNardo in Support of Motion for Entry of
 Default Judgment, filed September 16, 2005 ("C04-2531 De Nardo Decl."); C05-1758
 Declaration of Scott M. De Nardo in Support of Motion for Default Judgment, ("C05-1758 De
 Nardo Decl.") at ¶¶2-3; Letter and attachments, filed in C05-1758 on October 4, 2005.

1 **2. Hourly Rates**

2 Plaintiffs seek reimbursement of their attorneys' time at the rates of \$185,
3 \$195, and \$225 per hour for Mr. DeNardo, \$215 and \$255 per hour for Mr. Lynn,
4 and \$85 and \$125 per hour for Mr. Lunch, a law clerk. Consolidated DeNardo
5 Decl., at ¶2. Mr. Lunch is a third year law student at Hastings College of the Law
6 and did the same kind of work as would a paralegal. Consolidated DeNardo Decl.,
7 at 3; Transcript of September 28, 2005, hearing.

8 Mr. De Nardo's and Mr. Lynn's billing rates are commensurate with the
9 prevailing market rate in the Bay Area for lawyers of counsel's skill and experience
10 doing the kind of work these matters involved. We RECOMMEND that Judge
11 Armstrong approve these hourly rates.

12 When we turn to the rates charged for work by Mr. Lunch, the paralegal, we
13 confront a slightly more complicated situation. Plaintiffs seek reimbursement for
14 paralegal work at two different rates: \$85 per hour and \$125 per hour. The \$85 per
15 hour figure is within the range of reasonable market rates in the Bay Area for work
16 by a paralegal in a setting like this. It follows that we RECOMMEND that Judge
17 Armstrong approve plaintiffs' request for compensation for the hours devoted to
18 this matter by Mr. Lunch that were billed at \$85 per hour. However, plaintiffs have
19 failed to justify the \$125 per hour rate for the remainder of the work done by Mr.
20 Lunch. Having reviewed requests for fees in many cases of this kind, the court is
21 well-positioned to take judicial notice of the fact that the going local market rate
22 for work of this kind by paralegals does not exceed \$95 per hour. We therefore
23 RECOMMEND that Judge Armstrong approve compensation at a rate of \$95 per
24 hour for those paralegal hours for which plaintiffs seek compensation at \$125 per
25 hour. If Judge Armstrong accepts this recommendation, she will reduce plaintiffs'
26 fees by \$183.00 – as Mr. Lunch billed 6.1 hours at the \$125 per hour rate.

27 //

28 //

1 **3. Costs**

2 Plaintiffs also seek costs in the amount of \$596.71.¹⁰ Consolidated DeNardo
3 Decl., at 4 and 5. Plaintiffs' costs consist of this Court's filing fee, the cost of
4 service of each Summons and Complaint and other papers filed in this action,
5 photocopies and postage. See, all De Nardo Declarations and exhibits thereto. The
6 items for which reimbursement is sought constitute taxable costs and/or out-of-
7 pocket expenses normally chargeable to the client. Civil L.R. 54-3. *Accord*,
8 *Harris v. Marhoefer*, 24 F.3d 16 (9th Cir. 1994) (fee award under 42 U.S.C.
9 §1988). The amounts expended were reasonable. We, therefore, RECOMMEND
10 that Judge Armstrong grant plaintiffs' request for costs in the amount \$596.71.

11
12 **4. Recommendation**

13 For the reasons set forth above, if Judge Armstrong adopts this court's
14 recommendation to enter judgment in favor of plaintiffs on their claim for unpaid
15 contributions, we RECOMMEND that Judge Armstrong award plaintiffs costs and
16 fees in the amount \$10,254.71.¹¹

17
18 **E. Post judgment interest**

19 In their Consolidated Motion plaintiffs seek post judgment interest from
20 August 20, 2005. Consolidated Motion at 5. However, plaintiffs set forth no
21 authority or evidence that would support a finding that they are entitled to post-
22 judgment interest, or if so, the rate to which they are entitled. Moreover, there is no
23 basis for a finding that post-judgment interest should accrue from August 20, 2005.

24
25
26

27 ¹⁰This amount does not include costs that counsel, in the exercise of his billing judgment,
eliminated from the fee request. Consolidated DeNardo Decl., at 4.

28 ¹¹The total sought (\$10,437.71) minus \$183.00 for the reduction to Mr. Lunch's billing
rate.

1 Plaintiffs have opted not to pursue post-judgment interest at this time. See,
2 Transcript of January 18, 2006, hearing. By doing so, plaintiffs do not waive their
3 right to seek post-judgment interest at a later date. *Id.*

4 We RECOMMEND that the District Court not address at this time whether
5 plaintiffs are entitled to post-judgment interest and, if so, the amount. We also
6 RECOMMEND that Judge Armstrong not preclude plaintiffs from requesting post-
7 judgment interest after Judge Armstrong enters a final judgment.

8
9 **III. Conclusion**

10 For the reasons stated above, we RECOMMEND that Judge Armstrong enter
11 judgment in plaintiffs' favor and against Airteks for unpaid contributions known to
12 be delinquent at this time, interest through August 20, 2005, liquidated damages,
13 attorneys' fees and costs in the amount \$30,502.58 plus interest from August 21,
14 2005, through the date of judgment according to proof. Additionally, we
15 RECOMMEND that the monetary judgment be entered in favor of U.A. Local 342
16 Joint Labor-Management Committee and that the Court order the JLM to distribute
17 recovered sums pursuant to the Joint Services Agreement.

18 We further RECOMMEND that Judge Armstrong enter an order compelling
19 Airteks to submit to an audit for the purpose of determining the amount of fringe
20 benefit contributions owed for the period from February 20, 2002, through the
21 present, and to provide relevant records requested by the auditor, including, but not
22 limited to, Airteks' monthly reports for June, August, November and December
23 2003 as well as for 2004 and 2005.

24 Following completion of an audit procedure in which Airteks is permitted to
25 participate, we RECOMMEND that Judge Armstrong enter judgment by default in
26 favor of plaintiffs and against Airteks for unpaid contributions as determined by the
27 audit, interest at the rate of 12%, and statutory and/or contractual liquidated
28 damages according to proof.

1 We further RECOMMEND that Judge Armstrong decline to enter judgment
2 as to Jerome Bohland, individually, at this time.

3 A copy of this court's Proposed Judgment is attached hereto.

4 **The Court ORDERS plaintiffs to serve a copy of this Report and**
5 **Recommendation on defendants immediately.**

6 IT IS SO REPORTED AND RECOMMENDED.

7 Dated: January 18, 2006

8 /s/ Wayne D. Brazil
9 WAYNE D. BRAZIL
United States Magistrate Judge

10 Copies to:
11 Plaintiffs with direction to serve defendants,
12 SBA, wdb, stats
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